89-78 (1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

KENNETH M. JAFFEE,
and
TAX LOT 1500, TOWNSHIP 38 SOUTH,
RANGE 2 EAST, SECTION 27,
FURTHER IDENTIFIED AS 300 COVE ROAD,
ASHLAND, JACKSON COUNTY, OREGON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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81PP

QUESTIONS PRESENTED

1. Whether the Eighth Amendment's proportionality requirement is applicable to the civil forfeiture of a home under 21 U.S.C. § 881(A)(7); and if so,

(a) Whether the Eighth Amendment's proportionality requirement mandates specific findings of fact by the District Court concerning the proportionality of the value of real estate forfeited to the gravity of the offense of the wrongdoer;

(b) Whether hearsay evidence regarding the value of contraband may be relied upon as a basis for granting summary judgment pursuant to a forfeiture action under 21 U.S.C. § 881(A)(7); and

(c) Whether summary judgment is appropriate where there is a material question of fact as to the value of contraband pursuant to a forfeiture action under 21 U.S.C. § 881(A)(7);

2. Whether the century-old doctrine of judicial restraint, developed in the whiskey-still cases, applies in marijuana cultivation cases (i.e., should forfeiture be limited to the value of the property actually used or intended to be used for a violation of Title 21);

3. Whether the Fifth Amendment Procedural Due Process clause requires a pre-seizure hearing, or at least a prompt post-seizure hearing, when a claimant's home is the target of forfeiture under 21 U.S.C. § 881(A)(7);

4. Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a civil forfeiture of a personal residence worth $90,000 where the owner of the home has already been punished through the criminal process for the same offense, and fined only $50;

QUESTIONS PRESENTED – Continued

5. Whether the Fourth Amendment's protections against unreasonable searches and seizures prohibit federal agents from searching claimant's home without a search warrant, on the pretext that the government is now the "owner" of the home, and claimant is merely a "tenant."

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray for the writ of certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit entered April 14, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 861 F.2d 232, and is attached as Appendix A, *infra* at A-1.

The Memorandum Opinion of the United States District Court for the District of Oregon (Owen M. Panner, C. J.) has not been reported. A copy is attached as Appendix B, *infra* at A-12.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on November 14, 1988. The Court of Appeals denied a timely petition for rehearing on April 14, 1989. A copy of the order denying the petition is attached as Appendix C, *infra* at A-20.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the Fourth, Fifth and Eighth Amendments to the United States Constitution.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No personal shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The statutes involved are 21 U.S.C. § 881, and Rules C(3) and E(4)(f) of the Supplemental Rules for Admiralty and Maritime Claims. The full texts of the statutes are attached as Appendix D, *infra* at A-22. 21 U.S.C. § 881(a) provides:

> "(a) **Property Subject.** The following shall be subject to forfeiture to the United States and no property rights shall exist in them:
>
> * * *
>
> "(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by

that owner to have been committed or omitted without the knowledge or consent of that owner."

21 U.S.C. § 881(b) provides:

"(b) **Seizure Pursuant To Supplementary Rules For Certain Admiralty And Maritime Claims; Issuance Of Warrant Authorizing Seizure.**

"Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when

* * *

"(4) The Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

"In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing seizure of the property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure."

Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims provides:

"**(3) Judicial Authorization and Process.** Except in actions by the United States, for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold,

or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and a warrant for the arrest, and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

Rule E(4)(f) of the Supplemental Rules of Admiralty and Maritime Claims provides:

> **"Procedure For Release From Arrest Or Attachment.** Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon the certification of sufficient cause filed pursuant to Title 46 U.S.C. § 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States."

STATEMENT OF THE CASE

1. PROCEEDINGS IN THE DISTRICT COURT.

A. Status of Proceedings Below.

Respondent and plaintiff USA filed this action in the United States District Court for the District of Oregon seeking forfeiture of petitioner Jaffee's home and the

entire five-acre parcel on which his home is situated, pursuant to 21 U.S.C. § 881(a)(7) (E.R. A). The district court therefore had original jurisdiction of the case under 28 U.S.C. § 1331. At the same time respondent USA filed a motion for issuance of warrant of arrest with an accompanying affidavit (E.R. B). The warrant of arrest was issued by the clerk the same day (E.R. C).

Petitioner Jaffee filed his answer and counterclaim (E.R. D) and subsequently filed a motion for an order for plaintiff to show cause instanter why arrest or attachment should not be vacated (E.R. E). The government opposed petitioner's motion (E.R. F) and the Magistrate entered his findings and recommendation denying petitioner's motion (E.R. G), which ruling was confirmed by the District Court's Order (E.R. H).

Petitioner Jaffee filed his motion for summary judgment (E.R. I) and the government opposed Jaffee's motion and filed its cross-motion for summary judgment (E.R. J). Petitioner Jaffee filed his memorandum and affidavit in opposition to the government's motion for summary judgment (E.R. K).

The court issued its opinion granting the government's motion for summary judgment and denying petitioner Jaffee's motion for summary judgment (E.R. L), filed the Order (E.R. M) and entered Judgment (E.R. N).

B. Statement of Facts.

Claimant Jaffee's home was broken into, and its interior photographed by federal agents, acting without a search warrant. The government has seized the home, worth $94,000, without affording its owner a hearing. Mr. Jaffee has been punished in a separate and prior criminal proceeding by the state of Oregon (a $50 fine) for the same acts on which the federal government now bases its forfeiture claims.

Mr. Jaffee purchased the home and surrounding five acres for $90,000 in May, 1984. The funds for the purchase came from the proceeds of a life insurance policy of which Jaffee was the beneficiary. The property was not purchased with tainted funds, nor was it the fruit of criminal actions. Mr. and Mrs. Jaffee have lived in the home since then. The agreed value of the home and land at the time of seizure was $94,810 (E.R. R at 2).

On August 6, 1985, state police executed a search warrant issued by the state of Oregon for the search of Jaffee's home and surrounding premises. They found 143 marijuana plants growing in two places: (1) on a deck attached to the house; and (2) in a garden bed outside the house measuring approximately two and one-half feet by five feet. The total area of ground space used for growing marijuana was less than 200 square feet.

The marijuana plants were immature and without buds. Twenty to thirty plants were only one-inch high, and the rest varied in height. The maximum harvest at the time of seizure was approximately five pounds of leaves, having a value of *less* than $1,000 (Jaffee Aff. E.R. K at 10). No special hookups of any kind for irrigating the marijuana existed, and the normal domestic well was the only source of water for Jaffee's home and the surrounding premises (Jaffee Aff. E.R. K at 11-12).

On August 15, 1985, Jaffee was indicted by the Jackson County Grand Jury for cultivating marijuana. Jaffee entered a guilty plea to the charge of manufacturing a controlled substance (marijuana) in violation of Oregon Revised Statutes 475.992. On December 18, 1985, Jaffee was sentenced pursuant to his guilty plea, and was placed on a supervised probation for two years. Jaffee was also ordered to contribute 200 hours of community service, and pay a $50 assessment fee. Jaffee has not appealed his conviction or sentence.

After Jaffee's guilty plea, but before his sentencing, the government filed its Complaint *in rem* on October 16, 1985. On the same day, the Clerk of the court authorized a warrant for arrest *in rem* based on the Order of the United States Magistrate (E.R. O), who had examined the government's motion and affidavit (E.R. B).

Two days later, on October 18, 1985, federal and local government agents broke into Jaffee's home, searched and photographed the interior and exterior of the home, and posted notice that the home had been arrested. The entrance and search was without Jaffee's permission, who was not home at the time (Jaffee Aff. E.R. K at 11). The agents returned at a later time to serve Jaffee personally with the complaint and arrest warrant.

Jaffee was told by government agents that he must sign a contract (E.R. P) if he wished to remain on the property. The contract required Jaffee to pay a security deposit of $250, and monthly rent of $250 to the United States Marshall, as well as waive his Fourth Amendment rights against unreasonable searches (E.R. P at paragraphs 5 and 7). Jaffee was informed that he would not be allowed to remain in his home unless he signed this contract. Jaffee signed the contract under protest on October 18, 1985. Since that time, Jaffee and his wife have lived on the property without the security of their Fourth Amendment rights because the government insisted the agreement was valid. Although the government has not threatened to evict Jaffee and his wife for nonpayment of rent, it continues to insist that such rents are due, and also that Jaffee's home is subject to search without warrant based on the claimed forfeiture and contract.

Jaffee has not had a trial on this forfeiture complaint, and the only evidentiary hearing was by affidavit on the motions for summary judgment which was not held until

March 16, 1987, nearly seventeen months after the seizure.

C. Opinion Of District Court.

The District Court found that Jaffee's Fifth Amendment due process rights were not violated because the government obtained prior ex parte judicial review from a Magistrate. Second, although the District Court found that the Eighth Amendment applies to forfeiture actions which are "quasi-criminal," it held the forfeiture in this case was not excessive. The court based its decision on the fact that if the officers had discovered the plants later in the growing season, the value of the plants would have exceeded the value of the property. Third, the District Court declined to apply judicial restraint to the facts in this case, and held that forfeiture was appropriate because petitioner Jaffee had grown in excess of 100 plants. Appendix B, *infra*, A-12.

2. PROCEEDINGS IN THE COURT OF APPEALS.

On appeal to the Ninth Circuit, petitioner Jaffee argued that the District Court erred by: (1) Not making appropriate findings of fact as to the value of the marijuana as required by the Eighth Amendment; (2) Relying on hearsay evidence contained in the government's affidavit regarding the value of the marijuana; (3) Entering summary judgment on the value when the value of the marijuana was a material fact in dispute; (4) Failing to exercise judicial restraint to limit the forfeiture to the value of the portion of the property actually used to grow the marijuana; (5) Ruling the Fifth Amendment Due Process Clause does not require a pre-seizure hearing, or at least a prompt post-seizure hearing when a citizen's home is seized; and (6) Holding the Fourth Amendment

does not prohibit government agents from searching petitioner's home more than 60 days after the last finding of probable cause, without issuance of a new search warrant.

The Ninth Circuit reversed the District Court on the issue of the Eighth Amendment application, and held that Eighth Amendment does not apply to civil forfeiture actions. The Ninth Circuit further held that at the time of the forfeiture, petitioner Jaffee was growing 143 plants over his garage and garden, and that given this "extensive operation" there was no need for judicial restraint, or to go into the value of the crop or real property. Finally, the Ninth Circuit held that the pre-seizure review by the Magistrate cured any possible constitutional defects in 21 U.S.C. § 881. Appendix A, *infra*, at A-1.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THE QUESTION LEFT OPEN IN *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, et al., WHETHER THE EIGHTH AMENDMENT APPLIES TO "QUASI-CRIMINAL" FORFEITURE PROCEEDINGS, AND THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THIS QUESTION.

In *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, et al., 492 U.S. ___ (1989), a case decided by this Court only two weeks ago, this Court held that the Eighth Amendment does not apply to punitive damage awards in cases between private parties. This Court specifically left open the question of whether the Eighth Amendment applies in a civil case where the government is the taking party, a question which is now before this Court. The Court should therefore grant review in this case to decide whether the Eighth Amendment applies to

"quasi-criminal" forfeitures of the homes of United States citizens.

2. THE NINTH CIRCUIT'S DECISION THAT THE EIGHTH AMENDMENT PROPORTIONALITY REQUIREMENT DOES NOT APPLY TO CIVIL FORFEITURES CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS WHICH HOLD THAT A FORFEITURE ACTION IS "QUASI-CRIMINAL," AND THAT CONFLICT SHOULD BE RESOLVED BY THIS COURT.

A. In Rem Forfeiture Actions Are "Quasi-Criminal."

The Court of Appeals' decision holding that the Eighth Amendment does not apply to civil forfeiture actions under Title 21 U.S.C. § 881 conflicts with the decisions of this Court which have held that forfeiture actions are "quasi-criminal," and this conflict should be resolved by the court.

The Ninth Circuit Court of Appeals held that the Eighth Amendment proportionality requirement does not apply to in rem forfeitures, but only to criminal forfeitures which are in personam. The court recognized that the two proceedings are functionally equivalent and differ only in form. Only the historical development of the two actions has led courts to continue the fiction that in rem proceedings are against the residence, rather than against the individual. Based on this fiction, the Ninth Circuit held that the Eighth Amendment, which "deals with whether a person deserves punishment," does not apply to a civil forfeiture proceeding directed at the home of a United States citizen.

The Ninth Circuit's conclusion conflicts with this Court's prior decisions that civil forfeiture provisions are "quasi-criminal," and should be afforded criminal safeguards. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380

U.S. 693, 700, 799, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965). In *Plymouth*, this Court held that because civil forfeiture actions in general are quasi-criminal, the civil forfeiture statute was subject to the Fourth Amendment prohibitions against unreasonable searches and seizures. *See also Boyd v. United States*, 116 U.S. 616 (1886), holding that forfeitures are quasi-criminal in nature, and are "within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of the portion of that Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself, * * *." *Id.*, at 634.

Other Federal Circuits have held that there is no substantial difference between an in rem proceeding and a forfeiture proceeding brought directly against the owner. *See United States v. Huber*, 603 F.2d 387, 397 (2nd Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). *See also United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987), *affirmed after appeal on remand*, 872 F.2d 431 (1989) (a forfeiture action under the RICO statute is "clearly punishment as that term is used in the Eighth Amendment").

In *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987), the court conceded that the government would be able to accomplish in a criminal forfeiture proceeding under § 853 precisely what it could do through a separate civil forfeiture proceeding under § 881. *Id.*, at 1367. Thus, in *Littlefield*, the Ninth Circuit recognized the lack of any meaningful difference between criminal and civil forfeitures.

B. Criminal Forfeitures Must Be Proportional To The Crime.

Federal Circuits have uniformly held that in the context of a criminal forfeiture, the Eighth Amendment man-

dates that the punishment be proportional to the crime. *See United States v. Busher, supra; United States v. Huber, supra; United States v. Littlefield,* 821 F.2d 1365 (9th Cir. 1987); *United States v. Monroe,* 866 F.2d 1357 (11th Cir. 1989) (the court applied the proportionality test although it declined to decide whether criminal forfeitures were subject to the Eighth Amendment's prohibition on disproportionate punishments).

C. 21 U.S.C. § 881 Forfeitures Are Equivalent To Criminal Forfeitures And Should Be Subject To The Same Safeguards Requiring Proportionality.

Under 21 U.S.C. § 881(A)(7), the District Court has no discretion or authority to exclude from the forfeiture order any of the property the trier of fact finds is covered by the literal language of the section. Forfeiture actions under § 881 which are in rem are no different in result than criminal forfeitures which are in personam. Only the label is different. Both types of actions equally "punish" the owner of the forfeited property. The Eighth Amendment's proportionality requirement should therefore apply equally to all forfeitures, but especially when it is the *home* of a citizen that is to be forfeited.

This petition should be granted to resolve the conflict between the line of cases which hold that civil forfeiture proceedings are "quasi-criminal" in nature, and the recent line of Circuit Court cases which hold that despite their quasi-criminal nature, the Eighth Amendment proportionality safeguards do not apply to civil in rem forfeitures under 21 U.S.C. § 881.

3. THE COURT OF APPEALS' DECISION, HOLDING THAT THE EIGHTH AMENDMENT'S PROPORTIONALITY REQUIREMENT DOES NOT APPLY TO CIVIL FORFEITURE ACTIONS, AND THAT THE DISTRICT COURT WAS NOT REQUIRED TO MAKE SPECIFIC FINDINGS OF FACT CONCERNING THE PROPORTIONALITY OF THE VALUE OF THE REAL ESTATE FORFEITED TO THE GRAVITY OF THE OFFENSE OF THE WRONGDOER, CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS, AND THE CONFLICT SHOULD BE RESOLVED BY THIS COURT.

A. Specific Findings of Fact As To The Value Of The Real Estate Forfeited To The Gravity Of The Offense Of The Wrongdoer Are Required.

The Court of Appeals' decision that, in a civil forfeiture proceeding, there is no need to make specific findings of fact regarding the relative values of the property forfeited to the value of the enterprise, conflicts with decisions of this Court and the conflict should be resolved.

In *United States v. Busher, supra,* the Ninth Circuit held that in the context of a criminal RICO forfeiture, courts must follow the proportionality requirements of *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). In *Busher,* the court stated that the District Court

> "* * * must, consistent with *Solem,* consider: (1) The harshness of the penalty in light of the gravity of the offense; (2) Sentences imposed for other offenses in the federal system; and (3) Sentences imposed for the same or similar offenses in other jurisdictions. 463 U.S. at 292, 103 S.Ct. 3010."
>
> "In considering the harm caused by defendant's conduct, it is certainly appropriate to take into account its magnitude: The dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened or risked, or whether the crime has severe collateral consequences, e.g., drug addiction. * * *

> "The court should be reluctant to order forfeiture for defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income."

United States v. Busher, 817 F.2d at 1415-16.

In *United States v. Littlefield*, *supra*, 821 F.2d at 1366-68, a criminal forfeiture proceeding under 21 U.S.C. § 853, the Ninth Circuit similarly held:

> "The District Court must therefore determine, consistent with *Busher*, *see id.*, at 415-16, that forfeiture of the entire property on which drugs are cultivated together with other punishments imposed is not so disproportionate to the offense committed as to violate the Constitution. In making that determination, the court is not limited to the factors specifically mentioned in *Busher*, but may take into account other relevant considerations, including the value of the illegal drugs cultivated on the property, and the nexus between the portion of the property actually used to grow marijuana plants and the rest of the land."

Id., at 1368.

In *United States v. Walsh*, 700 F.2d 846 (2nd Cir. 1983), *cert. denied*, 464 U.S. 825, 104 S.Ct. 96, 78 L.Ed.2d 102 (1983), the court held:

> "An enterprise implicated in RICO activity may also be substantially engaged in a legitimate interest, * * *. The Eighth Amendment in such a situation may well prohibit forfeiture of the entire interest in the enterprise."

Id., at 857.

Several Federal Circuits have held that the Eighth Amendment's proportionality review requires specific findings of fact as to the value of the property forfeited compared to the value of the illegal enterprise. The Circuits are reluctant to accord these same safeguards to

civil forfeitures. *See United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989); *United States v. Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988).

The same findings of fact required in a criminal forfeiture proceeding should be required in a civil forfeiture proceedings, because in rem forfeiture proceedings are "quasi-criminal." *See One 1958 Plymouth Sedan, supra*, 380 U.S. at 799. Unless specific findings of fact are required in civil forfeiture proceedings as well as in criminal forfeiture proceedings, ironically the civil forfeiture actions will result in harsher punishments. The distinction between in rem and in personam forfeiture is a fiction. The end result is that the government can take a citizen's home, no matter its value, and no matter the gravity of the owner's offense, with *no* judicial review.

Whether the safeguards of the Eighth Amendment, which include the requirement of specific findings of fact as to the value of the land and enterprise, therefore apply equally to civil and criminal forfeitures presents an important constitutional question which this Court should review, especially when a citizen's *home* is the target.

B. In The Event This Court Reviews Whether The District Court Must Make Specific Findings Of Fact As To The Relative Values Of Real Estate Compared To the Contraband, The Court Should Also Review What Type of Evidence Is Admissible In Rendering A Valuation.

Questions 1.(b) and 1.(c) presented for review (whether the District Court may consider hearsay evidence as to the value of what the marijuana would have been had it gone through to cultivation, and whether the District Court may grant summary judgment where there is a disputed fact as to the value of the crop) are intertwined with question 1.(a) of whether the District Court

should have to make specific findings of fact as to the relative values of the crop in proportion to the value of the property.

In the present case, the District Court acknowledged the fact that at the time the crop was seized, it was valued at *less* than $1,000. The District Court, however, took notice of the fact that if the crop had been cultivated, based on the government's affidavit (which included hearsay evidence), the crop would have been valued at $500,000, which is greater than the value of the property. Whether a forfeiture proceeding is proportional to the crime under the Eighth Amendment, therefore, depends upon what value the court places on the contraband or enterprise, based on unbridled speculation as to *future* value.

If this Court decides that the Eighth Amendment requires specific findings of fact as to the value of real estate compared to the contraband, it should address what type of evidence may be relied upon to value the contraband, including (1) the time at which the drugs are valued, and (2) whether summary judgment is appropriate where there is a dispute as to the value of the contraband.

4. THE COURT OF APPEALS' DECISION HOLDING THAT THE DOCTRINE OF JUDICIAL RESTRAINT IS UNNECESSARY IN AN IN REM FORFEITURE PROCEEDING CONFLICTS WITH OTHER FEDERAL CIRCUITS, AND THE CONFLICT SHOULD BE RESOLVED BY THIS COURT.

In the absence of providing the Eighth Amendment proportionality safeguards, a ruling is needed by this Court stating that at a minimum, in the forfeiture of a home, a court should exercise judicial restraint. Forfeiture

is known to be a drastic remedy where the potential for abuse is great.[1]

Section 881 provides that in all real property forfeiture cases, "* * * all property, including any right, title, and interest in the whole of any lot or tract of land * * * is to be forfeited." 21 U.S.C. § 881(A)(7).

Under the similar provision of 26 U.S.C. § 5615(3)(2), an alcohol distilling forfeiture statute, federal courts have exercised judicial restraint. In *United States v. Certain Piece of Land*, 1 Sawy. 84, 25 F.Cas. 366, 367 (D. Cal. 1870), the court reasoned as follows:

> "It is claimed on the part of the United States that the whole of this farm is forfeited constituting the 'lot or tract on which the distillery is situated.' It is apparent that if the statute is to be so construed in this case, it must receive the same construction in all cases, notwithstanding that the tract of land may be a ranch or many square leagues in extent. The statute would thus be construed to impose forfeiture of all the real estate owned by the offender, of which the site of the distillery formed a part.
>
> "The operation of such a law would not only be harsh, but unequal – for it would make the amount of the forfeiture depend, not on the value of the distillery established and the presumed magnitude of its operations, but upon the accidental circumstance that

---

[1] *See In re Forfeiture of 719 North Main*, 437 N.W.2d 337 (Mich. 1989), where the court rendered the following scenario:

> "If one possesses one marijuana cigarette in his dwelling house, is the house subject to forfeiture under the statute? On the other hand, * * * if the forfeit[ed] * * * property [is] used exclusively for the preparation, storage, and sale of 'crack,' the result might [be] different. * * *.
>
> "The answer is in the nexus. The ownership of a home may be wholly unconnected with the personal use of an illegal substance. * * *."

Id., at 337.

> the illicit distiller happened to own a large tract, on the corner of which a still, perhaps of insignificant proportions, was erected."

25 Fed. Cas. 366.

The logic and holding of *United States v. Certain Piece of Land* was followed in subsequent in rem actions against real property brought under the alcohol distilling forfeiture statutes. *See, e.g., United States v. About 151.682 Acres of Land*, 99 F.2d 716 (7th Cir. 1938); and *United States v. Twenty Acres of Land*, 213 F.Supp. 808 (E.D. Tenn. 1962).

Similarly in cases related to the evasion of revenue tax laws, the Supreme Court has allowed forfeiture only of that personal property actually connected or related to the evasion. *See United States v. Ryan*, 284 U.S. 167, 52 S.Ct. 65, 76 L.Ed.2d 24 (1931). *See also United States v. Jenello*, 102 F.2d 587 (3rd Cir. 1939); *United States v. One Chevrolet Sedan*, 54 F.Supp. 553 (D. R.I. 1944); and *United States v. Stewart Truck*, 36 F.Supp. 353 (W.D. N.Y. 1941).

The application of § 881(A)(7) could, and in this case did, lead to a harsh result. In the present case, the area used for growing marijuana was no more than 200 square feet, and at most represented five percent of the total property of petitioner.

In the absence of any Eighth Amendment safeguards of proportionality, there is a need for courts to apply judicial restraint. For the same reasons discussed in the RICO forfeiture cases, and in the tax forfeiture cases, judicial restraint should also apply in the § 881 forfeiture cases.

Whether the concept of judicial restraint should be applied in the civil in rem forfeiture proceeding of a *home* under § 881 is therefore an important question which this Court should resolve.

5. THE COURT OF APPEALS' DECISION THAT THE FIFTH AMENDMENT DOES NOT REQUIRE A PRE-SEIZURE, OR AT LEAST A PROMPT POST-SEIZURE HEARING WHEN A CLAIMANT'S PERSONAL RESIDENCE IS THE TARGET OF THE FORFEITURE, CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

This Court has held that the Fifth Amendment Due Process safeguards apply to in rem forfeitures. *Boyd v. United States*, 116 U.S. 616 (1886). Federal Circuits as well have noticed that in a forfeiture action there is a particular concern for due process which arises by reason of the "drastic nature" of the forfeiture remedy. *United States v. Pole No. 3172, Hopkin Town*, 852 F.2d 636, 638 (1st Cir. 1988); *United States v. $38,000 in U.S. Currency*, 816 F.2d 1538 (11th Cir. 1987); *United States v. Property Known As 6 Patricia Drive*, 705 F.Supp. 710 (D. R.I. 1989).

Rule C(3) of the Supplemental Admiralty and Maritime Rules provides:

> "* * * [I]n actions by the United States for forfeiture for federal statutory violations, the clerk upon filing the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of extraordinary circumstances."

On August 1, 1985, the following provision was added to Rule C(3):

> "*Except in actions by the United States for forfeitures of the federal statutory violations*, the verified complaint and any supporting papers shall be reviewed by the court, and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service * * *." (Emphasis added.)

Section 881 therefore does not provide for any pre-seizure hearing for forfeiture of real estate.

A. Section 881 Is Unconstitutional Because It Does Not Provide For A Pre-Seizure Hearing.

In interpreting § 881, at least one District Court has stated that, absent exigent circumstances, the Constitution forbids seizure of real property under § 881 without prior judicial review. *See United States v. Property Located at 4880 S.E. Dixie Highway,* 612 F.Supp. 1492, 1498 (S.D. Fla. 1985). The District Court was reversed on appeal, *United States v. Property Located at 4880 S.E. Dixie Highway,* 838 F.2d 1566 (11th Cir. 1988). However, this Court should adopt the more persuasive reasoning of the District Court. The same sensitivity to constitutional protections for owners of seized real property was shown in *United States v. A Parcel of Real Property,* 636 F.Supp. 142 (N.D. Ill. 1986).

In *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), this Court held that in order to determine what process is due in a particular setting, one must consider three factors: (1) The private interest that will be affected by official harm; (2) the risk of an erroneous deprivation of such interest through the procedures used and probable value of any procedural safeguards; and (3) the government's interest, including further involved fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

In *Calero-Toledo v. Pierson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), this Court held that the due process clause did not require a pre-seizure hearing in the forfeiture of a yacht where there was a need for immediate seizure. The lower court in *Certain Real Estate Property Located at 4880 S.E. Dixie Highway,*

supra, however, distinguished the forfeiture of real property from the forfeiture of the vessel that was involved in the case of *Calero-Toledo*. This Court stated that the forfeiture in *Calero-Toledo*, which lacked pre-seizure notice and hearing, was upheld in part because:

> "[P]re-seizure notice and hearing might frustrate the interests served by the statutes, since the property seized – as here, a yacht – will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given."

416 U.S. at 679, 94 S.Ct. at 2090.

In *Certain Real Estate Property Located at 4880 S.E. Dixie Highway, supra*, the lower court argued that the concern about "disappearing property" was not applicable in cases involving real property. The court stated:

> "But *Fuentes* – and *Calero-Toledo* for that matter – make clear that some sort of pre-seizure hearing is necessary as long as there is a reasonable likelihood that the residence is not going to disappear. Certainly, where the property is large and immovable (e.g., land and buildings thereon), and the likelihood of it being concealed or destroyed is remote, there is no overriding need for 'prompt action' which would sacrifice the property owner's right to procedural due process."

612 F.Supp. at 1496. The court went on to state that the government protects its interests instead by attaching the properties or garnishing the proceeds of the sale of real estate. *Id.*, at 1496 n.7.

In this case, the private interest at stake is the right to possess one's own home. There is no need to justify seizure without a hearing where the property which is to be forfeited is real property. Other less drastic measures by the government can be taken to protect its interests. For instance, the government can file a lis pendens notice to protect its interests, and in fact did so here. There is no danger, as in *Calero-Toledo*, that the property will flee.

B. Section 881 Is Unconstitutional Because At A Minimum, It Should Provide For A Prompt Post-Seizure Hearing.

The Ninth Circuit held that even if § 881 violates the due process clause of the Fifth Amendment, any failure was cured by the ex-parte probable cause determination of the Magistrate.

At a minimum, however, even if the statutory defect was cured by the hearing with the Magistrate, the Fifth Amendment Due Process clause requires a prompt post-seizure hearing. This Court has held generally that judicial scrutiny is necessary before the issuance of a warrant of arrest, and that this should be followed by a prompt post-seizure hearing. *See Sniadach v. Family Financial Corporation*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 94 S.Ct. 1985, 40 L.Ed.2d 406 (1974).

Rule E(4)(f) of the Supplemental Admiralty and Maritime Rules states that:

> "Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted, * * *."

However, this rule is not applicable to "actions by the United States for forfeitures for violation of any statute of the United States." In this case, there was no post-seizure hearing; the only hearing was on summary judgment on March 16, 1987, nearly seventeen months after the property had been seized.

Prior to the amendment of Rule E(4)(f) in 1985, providing for a prompt post-seizure hearing, maritime cases as well held that seizure procedures under § 881 are unconstitutional. In *Alyeska Pipeline Service Company v. Bay Ridge*, 509 F.Supp. 1115 (D. Alaska 1981), *appeal dismissed*, 703 F.2d 381 (1983), *cert. dismissed*, 463 U.S. 1247 (1984), the court stated:

> "Finally, while a prompt post-seizure hearing can usually be obtained under local rules or custom, nothing in Rule C or the local admiralty rules of this district assures that a prompt post-seizure hearing can be obtained. The procedures required by admiralty Rule C fail to provide the due process standards now well established by the Supreme Court."

509 F.Supp. at 1120.

See also Techem Chemical Company v. M/T Choyo Maru, 416 F.Supp. 960, 969-70 (D. N.D. 1976) (seriously questioning the constitutionality of Rule C); *P.C. International, Inc. v. Vessel Susan*, 1980 A.M.C. 2062, 2063-68 (S.D. Fla. 1986).

This Court has held consistently that due process requires both a pre-seizure hearing and a post-seizure hearing to comply with the mandate of the Fifth Amendment. Section 881 and the Supplemental Admiralty and Maritime Rules fail to provide for either a pre-seizure hearing or a prompt post-seizure hearing in an in rem forfeiture proceeding of a citizen's home and therefore fail to provide due process.

This Court should grant this petition for review because of the important private interest at stake in owning a residence and being free from seizure without due process.

6. THIS CASE PRESENTS THE QUESTION LEFT OPEN IN *United States v. Halper:* WHETHER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE PROHIBITS A SUBSEQUENT CIVIL FORFEITURE PROCEEDING WHERE THE OWNER WAS PREVIOUSLY PUNISHED THROUGH THE CRIMINAL PROCESS, AND THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THIS QUESTION.

In *United States v. Halper*, 490 U.S. ___ (1989), this Court held that the Fifth Amendment places limits on the amounts the federal government may recover in a civil

action after the defendant has been punished through the criminal process.

In the present case, petitioner plead guilty to manufacturing a controlled substance under Oregon Revised Statutes 475.992, and was sentenced to supervised probation for two years, ordered to contribute 200 hours of community service, and to pay a $50 assessment fee. The federal government's subsequent forfeiture proceeding, which is "quasi-criminal," violates the Fifth Amendment Double Jeopardy Clause because the petitioner has already been punished and fined through the criminal process.

Halper was the first time in the history of this country that the Double Jeopardy Clause was applied to a *civil* case. Petitioner did not raise this issue below, because there was no law to support such a contention. The *Halper* decision was issued on May 15, 1989, after the Ninth Circuit had denied petitioner's motion for reconsideration. Despite this omission, petitioner requests this Court to review whether a civil forfeiture of a home, instituted after the owner has been punished for the same offense through a prior criminal process, violates the Fifth Amendment Double Jeopardy Clause.

7. THE COURT OF APPEALS' DECISION THAT THE FOURTH AMENDMENT DOES NOT PROHIBIT THE GOVERNMENT FROM SEARCHING A CLAIMANT'S HOME WITHOUT A SEARCH WARRANT, ON THE PRETEXT THAT THE GOVERNMENT IS NOW THE "OWNER" OF THE HOME AND THE CLAIMANT MERELY A "TENANT," CONFLICTS WITH A DECISION OF THE ELEVENTH CIRCUIT, AND THE COURT SHOULD RESOLVE THIS CONFLICT.

A. The Fourth Amendment Applies To Civil And Criminal Forfeiture Proceedings.

The Eleventh Circuit held in *United States v. Ladson*, 774 F.2d 436 (11th Cir. 1985), that federal agents may not

search a home which has been forfeited, without first obtaining a search warrant, absent exigent circumstances. In this case, the Ninth Circuit, *sub silentio*, upheld a warrantless search of a forfeited home.

This Court has previously held that the Fourth Amendment applies to civil forfeiture proceedings. *See One 1958 Plymouth Sedan v. Pennsylvania, supra.* Other Federal Circuits as well have held that a "forfeiture seizure must nevertheless comport with the requirements of the Fourth Amendment because 'no act of Congress can authorize a violation of the Constitution.' " *United States v. Spetz*, 721 F.2d 1457 (9th Cir. 1983); *Almeida-Sanches v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983) (because forfeiture proceedings are quasi-criminal in character and meant to penalize commission of offense against law, the exclusionary rule applies to such proceedings, barring evidence obtained in violation of Fourth Amendment); *United States v. Life Insurance Company of Virginia*, 647 F.Supp. 732, 742 (W.D. N.C. 1986) (because seizures violated the Fourth Amendment, claimants were entitled to recovery of their property); *In re Application of Kingsley*, 614 F.Supp. 219, 224 (D. Mass. 1985), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986).

This Court has previously stated that a search or seizure carried out on a person's premises without a warrant is per se unreasonable unless the police can show that it falls within one of the carefully defined set of exceptions based on the presence of exigent circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 5614 (1971); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Hershenow*, 680 F.2d 847 (1st Cir. 1982).

B. Section 881(b)(4) Is Unconstitutional Because It Provides For A Warrant With Searches And Seizures Without A Showing Of Exigent Circumstances.

At least one Federal Court has held that the procedure authorized by § 881(b) runs afoul of minimal Fourth Amendment procedure requirements. *See United States v. $128,035 in U.S. Currency*, 826 F.Supp. 668 (S.D. Ohio 1986), *appeal dismissed*, 806 F.2d 262 (6th Cir. 1986).

As stated in *United States v. $128,035 in U.S. Currency, supra*, § 881(b)(4)'s provision that the Attorney General may seize the property without process is unconstitutional. The Attorney General should either obtain a warrant or show exigent circumstances justifying a warrantless search. *Id.*, at 674.

This Court has also held that because the protection of private dwellings lies at the very heart of the Fourth Amendment only exigent circumstances will justify a warrantless intrusion into a home. *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *see also United States v. Ladson*, 774 F.2d 436 (11th Cir. 1985).

In the present case, the county sheriff executed a search warrant issued by the state of Oregon on August 6, 1985. Nearly two and one-half months later, on October 16, 1985, the United States government filed a complaint in rem, and a motion for issuance of a warrant in rem. Based on the complaint and motion, and without a probable cause hearing, U. S. Magistrate Michael Hogan granted a warrant for the arrest in rem of the property. Three days later, federal and local government agents broke into Jaffee's home, searched its interior, and posted signs announcing that the home was arrested. Although the government allows Jaffee to remain on the property as a tenant, the property is still subject to the forfeiture proceeding. The government therefore maintains it may come in at any moment, and search the house without a

warrant. The government has attempted to "bootstrap" its "probable cause" to search Jaffee's property at any time based on the seizure of marijuana on August 6, 1985. This attitude runs afoul of the Fourth Amendment's guarantee that all citizens are protected against unreasonable searches and seizures.

The present case is almost identical to the facts cited in *United States v. Ladson, supra,* 774 F.2d at 439-41, where federal agents searched property subject to a § 881 civil forfeiture proceeding after obtaining an order directing a written inventory of the real estate and property. The government argued it could legally enter the house to inventory furnishings and damages without a warrant. The Eleventh Circuit held that in the forfeiture action, absent exigent circumstances, the government may not conduct a warrantless search of the home. The court further held that the government's "supposed right as custodian to exercise the landlord's prerogative to enter makes a no more appealing bootstrap." *Id.*, at 440.

This petition should be granted to resolve whether § 881 and Rules C(3) and F(4) of the Supplemental Admiralty and Maritime Rules violate the Fourth Amendment's prohibition on unreasonable searches and seizures. Section 881(b) permits seizures without due process and without exigent circumstances, and clearly violates the test enunciated under *Coolidge, supra.* The questions presented are sufficiently important constitutional questions which should be resolved because several Federal Courts have already held that the search warrant procedure under § 881, runs afoul of the Fourth Amendment's warrant clause, and the Fifth Amendment's Due Process clause. *See United States v. $128,035 in U.S. Currency, supra; United States v. A Parcel of Real Property,* 636 F.Supp. 142, 145 (N.D. Ill. 1986); *In re Application of Kingsley,* 614 F.Supp. 219 (D. Mass. 1985), *appeal dismissed,* 802 F.2d 571

(1st Cir. 1986); *United States v. Certain Real Estates Property Located at 4880 S.E. Dixie Highway*, 612 F.Supp. 1492, 1497 (S.D. Fla. 1985); *United States v. Ladson*, 774 F.2d 436, 440 (11th Cir. 1985).

CONCLUSION

Petitioner Jaffee had his home broken into and raided without a search warrant by federal agents, and then confiscated by the government without a hearing, in a fictional nightmare: although he had already been punished by the state of Oregon for the same unlawful activity, double-jeopardy does not apply because the action was "civil," not criminal; the applicable rules were "maritime," not those of real property; petitioner Jaffee was not "personally" involved because his home was the "guilty" party, and therefore the value of his home was irrelevant to the gravity of his offense.

The government argued below that the Bill of Rights does not apply to the warrantless raid and the confiscation of Jaffee's home, because in this "forfeiture" wonderland, the emperor's naked act is clothed with legal illusions: the government's confiscation of a citizen's home is not "punishment"; the federal police are "private parties"; a seizure of a home because of a crime is "civil"; the home, not its owner, is the "criminal"; the landlocked house is a "vessel"; the homeowner is magically transformed into a "renter," with no right to a pre-seizure hearing, because the real estate might "sail away"; and the homeowner has no rights against searches, because he is suddenly only a "tenant."

This Court should accept review of the case to consider whether these legal illusions should be stripped away, and whether citizens should have the protection of fundamental constitutional rights in the Fourth, Fifth,

and Eighth Amendments before they are deprived of the enjoyment of ownership and occupancy of their homes because of a criminal offense for which they have already been punished.

DATED this 13th day of July, 1989.

Respectfully submitted,

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APPENDIX A

Ninth Circuit Opinion

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. TAX LOT 1500, TOWNSHIP 38 SOUTH, RANGE 2 EAST, SECTION 127, FURTHER IDENTIFIED AS 300 COVE ROAD, ASHLAND, JACKSON, COUNTY, OREGON, *Defendant-Appellant,* KENNETH M. JAFFEE, *Claimant-Appellant.*	No. 87-4011 D.C. No. CV-85-6446-OMP OPINION

Appeal from the United States District Court for the District of Oregon
Owen M. Panner, Chief Judge, Presiding

Argued and Submitted
July 12, 1988 – Portland, Oregon

Filed November 9, 1988

Before: Alfred T. Goodwin, Chief Judge, Arthur L. Alarcon and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Goodwin; Concurrence by Judge Ferguson

SUMMARY

Criminal Procedure

The court affirmed a civil forfeiture of land used to grow marijuana, concluding that the Eighth Amendment proportionality of punishment requirement does not apply to civil forfeitures.

After appellant Kenneth Jaffee was convicted in state court of "maufacturing" marijuana, the United States brought a civil forfeiture proceeding. The record showed that the house was valued at nearly $95,000 and that the 143 marijuana plants seized were young and worth less than $1,000, although the government contended they were of a type that could be worth between $500,000 and $1 million if grown to maturity. The trial court ordered seizure.

[1] The eighth amendment's proportionality requirement is not applicable to civil forfeiture actions. [2] Nor is the eighth amendment's proportionality requirement appropriate in in rem actions. [3] Finally, given the extensive operation, judicial restraint was properly not exercised.

Judge Ferguson concurs, but wrote separately to note that the forfeiture law permits forfeitures of property "used" for a violation, while Jaffee's land was no longer used for such purposes.

COUNSEL

Michael L. Williams, Williams and Troutwine, Portland, Oregon, for the defendant-appellant.

Jeffrey J. Kent, Assistant United States Attorney, Eugene, Oregon, for the plaintiff-appellee.

OPINION

GOODWIN, Chief Judge:

The owner of a dwelling house and surrounding land appeals a summary judgment forfeiting his land and improvements because they were used in the production of marijuana. The government brought civil forfeiture proceedings after Jaffee was convicted in state court of "manufacturing" marijuana.

Jaffee challenges the forfeiture on both proportionality and due process grounds. There are a number of disputed questions of fact. The question before us, however, is whether they are "material." There is no dispute that Jaffee was engaged in the type of horticulture that is forbidden by law.

Viewing the facts in the light most favorable to Jaffee, the record discloses that on August 6, 1985, Jaffee was the sole owner of real property located in Jackson County, Oregon, identified as 300 Cove Road, Ashland, Oregon. Jaffee says the value of the house and land at the time of seizure was $94,810. On August 6, state law enforcement officers executed a search warrant for this property. They found 143 marijuana plants. Most of the plants were young; many were not more than an inch high. They were worth less than $1,000. The government brief states that the plants were of the sinsemilla variety. If so, they could be worth between $500,000 and $1,000,000 when mature. Jaffee denies that the plants had any substantial value.

The plants were growing only on the deck over the garage and in a small (2½' by 5') garden adjacent to the house; the total area of ground space used for growing marijuana was less than 200 square feet.

Jaffee argues that the eighth amendment's proportionality of punishment requirement is applicable to forfeitures under 21 U.S.C.A. § 881(a)(7) (West 1981 & Supp. 1988).[1] *See United States v. Busher*, 817 F.2d 1409, 1413-16 (9th Cir. 1987). *Busher* held that the proportionality requirement announced in *Solem v. Helm*, 463 U.S. 277 (1983), was applicable to forfeiture cases. However, as the government points out, the *Busher* forfeiture was brought under RICO, 21 U.S.C.A. § 853 (West Supp. 1988), a criminal forfeiture provision. This appeal challenges a civil forfeiture.

[1] We have found no case holding the eighth amendment applicable to civil forfeiture actions. The text of the

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[1] Section 881(a)(7) provides:

a) The following shall be subject to forfeiture to the United States and no property rights shall exist in them:

. . .

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

eighth amendment "suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

Jaffee argues nonetheless that the practical punitive effects of civil forfeiture are indistinguishable from criminal fines. He relies in part on *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). In that case, the Pennsylvania courts had held that the exclusionary rule was not applicable in a civil forfeiture case. The Supreme Court disagreed, stating that "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700.

Relying on this language in *Plymouth Sedan*, the Second Circuit noted in its analysis of the eighth amendment implications of RICO forfeiture (one of the first criminal forfeiture statutes) that "[a]t least for this purpose, there is no substantial difference between an in rem proceeding and a forfeiture proceeding brought directly against the owner." *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (RICO criminal forfeiture statute which keys forfeiture to the magnitude of a defendant's criminal enterprise, does not violate eighth amendment's proportionality requirement).

[2] The government counters the criminal case analyses by pointing to *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). There, the Court rejected a challenge to a Puerto Rico statute modeled after § 881(a). The owner of the yacht claimed that the yacht could not be forfeited based on the actions of the

lessee, when the owner was "neither involved in nor aware of the act of the lessee which resulted in the forfeiture." *Id.* at 664. The Court analyzed the history of civil forfeiture actions from biblical times through the early English common law. Civil forfeiture actions were historically characterized as proceedings *in rem* against the objects which had offended the King. These objects were treated as being guilty themselves. *See id.* at 680-83; *see also United States v. $39,000 in Canadian Currency*, 801 F.2d 1210, 1218 (10th Cir. 1986). Thus, the Court noted that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo*, 416 U.S. at 683; *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) ("the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*").

It should be noted, however, that § 881(a)(7) exempts from forfeiture property used for illicit purposes without the knowledge or consent of the owner. 21 U.S.C. § 881(a)(7); *see also* 21 U.S.C. § 881(a)(4)(A) (exempting from forfeiture conveyances used for transporting controlled substances when the owner was not party or privy to the violation of the controlled substances laws). Thus, Congress has to some extent protected innocent owners.

The government argues that if the owner's innocence is not a defense to an *in rem* forfeiture, it makes no sense to apply the eighth amendment's proportionality review, because the proportionality " 'inquiry focuses on whether a person deserves such punishment.' " *Busher*, 817 F.2d at 1415 n. 11 (quoting *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J. dissenting)). This argument is persuasive. If the constitution allows *in rem* forfeiture to be

visited upon innocent owners who were imprudent in choosing bailees, the constitution hardly requires proportionality review of forfeitures imposed on the guilty who assumed the risk of forfeiture.

Critics of the law may well ask why the law requires proportionality review for forfeitures when the government proceeds *in personam*, but not when the government proceeds *in rem*. The two proceedings are functionally equivalent (except perhaps when the *res* is contraband) and differ only in form. But the historical development of the two actions has led courts to continue the fiction that *in rem* proceedings are against the *res*, rather than against the individual, even when the result is to create new members of the homeless. Given the Supreme Court's willingness to underwrite this historical fiction, *see Calero-Toledo*, 416 U.S. 663, it is difficult to deny the government's conclusion that the eighth amendment's proportionality requirement does not apply. "The life of the law has not been logic: it has been experience." O. W. Holmes, *The Common Law* 1 (1881).

Because this is a civil forfeiture, the *Busher* proportionality analysis was not necessary. We hold that there was no eighth amendment violation in forfeiting the property used to produce the contraband.

The next question is whether the court erred in failing to exercise judicial restraint to limit the forfeiture to the value of the portion of the property actually used to grow the marijuana. Jaffee urges this court to impose judicial restraint upon the district court, and to limit forfeiture to the small part of the land actually used for marijuana cultivation. Jaffee asserts that under a similar

provision, 26 U.S.C. § 5615(3)(c) (1982), which directs civil forfeiture of illegal distilling operations, courts have applied such restraint. On its face that statute, like § 881(a)(7), allowed forfeiture of the entire lot or tract of land. However, courts found that literal application of the language

> would not only be harsh but unequal – for it would make the amount of the forfeiture depend, not on the value of the distillery, . . . but upon the accidental circumstance that the illicit distiller happened to own a large tract, on the corner of which a still . . . was erected.

United States v. Certain Piece of Land, 25 F. Cas. 366, 366-67 (D. Cal. 1870). *Accord United States v. About 151.682 Acres of Land*, 99 F.2d 716 (7th Cir. 1938).

The government contends that these older cases were implicitly rejected in *United States v. Littlefield*, 821 F.2d 1365, 1366-68 (9th Cir. 1987). *Littlefield* was a criminal forfeiture case that allowed the criminal forfeiture provisions to reach the realty "in its entirety," and stated that the civil forfeiture provisions did the same.[2] However, as the government elsewhere argues, criminal forfeiture cases have questionable precedential value in civil forfeiture cases, given the historical distinction between the two types of actions. The government thus fails to note that *Littlefield's* refusal to exercise judicial restraint was premised in part on the availability of eighth amendment

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[2] In *Littlefield* we followed *Busher* to hold that the district court was required to determine that the forfeiture of the entire property was not so disproportionate as to violate the Eighth Amendment.

proportionality review to preclude exceedingly harsh results. As we have decided that eighth amendment proportionality review is not appropriate in *in rem* actions, we must review Jaffee's claim that judicial restraint should be exercised.

[3] The district court concluded that such restraint was inappropriate in this case. We agree. Jaffee chose to conduct his small farming operations on his own land which was subject to the risk of forfeiture. Some of his colleagues in the same business planted their crops on land already owned by the United States and managed somewhat randomly by various federal agencies. These growers faced the constant risk of losing their crop, but not that of losing their land. Jaffee chose to keep his crop close to home. At the time of forfeiture, Jaffee had 143 plants growing over his garage and in his garden. The district court correctly concluded that this was not a case for judicial restraint. Given this extensive operation, we find no need to go into the relative values of crop and real property.[3]

Finally, Jaffee challenges the procedures by which property may be forfeited. Under 21 U.S.C.A. § 881(b) (West 1981 & Supp. 1988), any property subject to civil forfeiture under that subchapter "may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims." Property may be seized without such process

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[3] Because we find a comparison of the relative values of the crop and real property unnecessary, we need not decide whether the government's estimate of value was based on inadmissible hearsay.

when "the Attorney General has probable cause to believe that the property is subject to forfeiture under this subchapter." 21 U.S.C.A. § 881(b)(4) (West 1981 & Supp. 1988).

As Jaffee points out, on their face these provisions allow forfeiture without prior judicial review. At least one court has held that, absent exigent circumstances, the constitution forbids seizure of real property under § 881 without prior judicial review. *See United States v. Certain Real Estate Property*, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985). However, in this case the government sought prior approval from a magistrate before seizing the property. This precautionary prior judicial review sufficiently cured any possible constitutional defect. Thus, we need not consider Jaffee's facial challenge to § 881. *See United States v. A Parcel of Real Property*, 636 F. Supp. 142, 145-46 (N.D. Ill. 1986). *See also Certain Real Estate Property*, 612 F. Supp. at 1497 (stating that due process would be satisfied if "a judicial officer has reviewed the complaint in an *ex parte* proceeding" prior to seizure).

AFFIRMED.

FERGUSON, Circuit Judge, concurring:

I concur in Judge Goodwin's opinion, but write separately on an issue presented only at oral argument.

Section 881(a)(7) permits forfeitures of [a]ll real property . . . *used, or intended to be used* [for a violation of Title 21]." 21 U.S.C. § 881(a)(7) (emphasis added). Yet when the government commenced federal forfeiture proceedings against Jaffee's property on October 16, 1985, Jaffee was

no longer growing marijuana on his land; state authorities had previously seized the plants in August while executing a search warrant. Nor does any evidence suggest that Jaffee intended to use his property in the future for marijuana cultivation.

It appears to me, however, that federal forfeiture proceedings are timely commenced if initiated shortly after filing, but prior to termination, of state court criminal proceedings. Since Oregon criminal proceedings were still pending against Jaffee at the time of the federal forfeiture action in October, the forfeiture of Jaffee's property finds support in section 881(a)(7).

APPENDIX B

District Court Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. TAX LOT 1500, TOWNSHIP 38 SOUTH, RANGE 2 EAST, SECTION 27, FURTHER IDENTIFIED AS 300 COVE ROAD, ASHLAND, JACKSON COUNTY, OREGON, Defendant.	Civil No. 85-6446-E OPINION (Filed May 5, 1987)

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PANNER, J.

The United States brings this action *in rem* for forfeiture of real property, pursuant to 21 U.S.C. § 881(a)(7). Kenneth Jaffee, sole owner and claimant of defendant property, counterclaims for rent. Jaffee moves for summary judgment. The government cross-moves for summary judgment. I grant the government's motion and deny Jaffee's motion.

BACKGROUND

On August 6, 1985, law enforcement officers executed a search warrant at claimant's property. The property consists of approximately five acres and includes Jaffee's home. The officers seized 143 marijuana plants, most growing outside and a few inside of the house. Affidavit of Frank D. Balazs (Balazs), Plaintiff's Brief, Exh. A. The plants varied in height from one inch to five feet. Affidavit of Kenneth Jaffee (Jaffee) at 2. The government estimated that if the plants reached maturity they would be worth in excess of $500,00. Balazs at 4. Jaffee estimates their worth at the time of seizure as less than $1,000. Jaffee at 2. Five percent of the total property was under cultivation. *See* Jaffee at 2; Claimant's Opposition to Cross-Motion for Summary Judgment at 7.

On October 9, 1985, Jaffee plead guilty in the Circuit Court for Jackson County, Oregon, to manufacturing marijuana. On December 9, 1985, Jaffee was sentenced to two years probation, 200 hours of community service, and a fifty dollar assessment fee. Balazs at 3.

On October 18, 1985, the government seized the property pursuant to a seizure warrant. Jaffee executed a government lease allowing him to rent the property for $250 per month during the tendency of this proceeding.

Jaffee moves for summary judgment on the grounds that the forfeiture procedure violated his constitutional guarantee of due process and the eighth amendment prohibition against cruel and unusual punishment. Jaffee also contends that, if the seizure was proper, judicial restraint should be applied to limit the forfeiture to the five percent of the property actually under cultivation.

The government cross-moves for summary judgment on the grounds that the procedure used to seize the property afforded Jaffee due process, the eighth amendment does not apply to this proceeding, and the forfeiture under these facts is not excessive.

STATUTE

This action is a civil forfeiture, pursuant to 21 U.S.C. § 881(a)(7), which provides:

> (a) The following shall be subject to forfeiture to the United States and no property rights shall exist in them:
>
> . . .
>
> (7) All real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that

> no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Property subject to forfeiture may be seized by the attorney general pursuant to process issued under the Supplemental Rules for Certain Admiralty and Maritime Claims. 21 U.S.C. § 881(b). Property may be seized without such process, when "the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of [section 881]." 21 U.S.C. § 881(b)(4).

DISCUSSION

1. *Due Process*

Jaffee contends that the forfeiture provisions deny him procedural due process as guaranteed by the fifth amendment by failing to require preseizure judicial review and a prompt post-seizure hearing. Jaffee contends that under *Fuentes v. Shevin*, 407 U.S. 67 (1972), he is entitled to prevail.

In *Fuentes*, the Supreme Court held unconstitutional a state statute which allowed a creditor to obtain a writ of replevin upon his own assertion of entitlement, without notice or hearing. The court identified a narrow exception in which an immediate seizure without prior notice or hearing would be constitutional:

> [First] the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for

> very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it is necessary and justified in the particular instance.

Fuentes, 407 U.S. at 91.

Jaffee contends that because this seizure involved real property, the government cannot meet the second *Fuentes* requirement; a special need for very prompt action.

In *United States v. Certain Real Estate Property*, 612 F. Supp. 1492 (S.D. Fla. 1985), the district court held that absent exigent circumstances, the Constitution forbids the attorney general from seizing real property pursuant to 21 U.S.C. § 881(b) without prior judicial review. *Id.* at 1498. The court found that when the government seizes real property, which is "large and immovable (*e.g.*, land and the buildings thereon), and the likelihood of it being concealed or destroyed is remote, there is no overriding need for 'prompt action' which would sacrifice the property owner's right to procedural due process." *Id.* at 1496. Upon balancing the interests of both the government and the individual, the court found that "the Fifth Amendment minimally requires that no warrant for the arrest *in rem* of real property should issue unless and until a judicial officer has reviewed the complaint in an *ex parte* proceeding and concluded that said complaint sets forth [probable cause] that the property is subject to forfeiture under section 881(b)." *Id.* at 1497.

Similarly, in *United States v. A Parcel of Real Property*, 636 F. Supp. 142, 145 (N.D. Ill. 1986), the court denied

petitioner's motion to dismiss, finding that the "extra steps"taken by the government to obtain prior *ex parte* judicial review before the seizure pursuant to section 881(b)(7) were sufficient to avoid the possible constitutional defect in the statute. *Accord United States v. 124 East North Avenue, Lake Forest, Ill.*, 651 F. Supp. 1350 (N.D. Ill. 1987).

Here, the government obtained prior *ex parte* judicial review. Based on the complaint and the affidavit of Balazs, Magistrate Hogan found reasonable cause for the seizure of the property, and issued a warrant. I find that the additional steps taken by the government to obtain prior judicial review were sufficient to meet requirements of due process. Claimant's due process rights were not violated.

2. *Eighth Amendment And Judicial Restraint.*

Jaffee contends that forfeiture of the entire parcel is so excessive that it violates the eighth amendment. That amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. Amend. VIII. The government contends that the eighth amendment pertains only to criminal cases, and has no application in this civil forfeiture proceeding, citing *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

Although the eighth amendment applies only to criminal proceedings, the Supreme Court has recognized that "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965). It

is possible that a forfeiture sanction could be "so harsh as to violate the Eighth Amendment." *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (applying RICO forfeiture provision).

I find that forfeiture of the entire parcel is not excessive. This was not a small amount of contraband for personal use. The officers found 143 plants. Jaffee's contention that at the time of seizure these plants were of little value and forfeiture is disproportionate is unpersuasive. If the officers had discovered the plants later in the growing season, the government estimates that the value of the crop would have exceeded the value of the property.

Jaffee urges that even if the statute technically allows the entire forfeiture this court should apply judicial restraint and limit forfeiture to the land under cultivation. Jaffee asserts that under a similar provision, 21 U.S.C. § 5615(3)(c), which imposes civil forfeiture of illegal distilling operations, courts have applied such restraint. That statute on its face allows forfeiture of the entire lot or tract of land on which the distillery is located. However, courts found that law to be "harsh" and "unequal," and therefore limited forfeiture to the land directly related to the distillery. *United States v. Certain Piece of Land*, 25 F. Cas. 366, 366 (D. Cal. 1870) (No. 14, 767); *accord United States v. About 151.682 Acres of Land*, 99 F.2d 716, 721 (7th Cir. 1938) (avoiding "a literal application of [forfeiture] statute, which would lead to absurd consequences").

Although Jaffee cites numerous cases in which courts have applied judicial restraint under other forfeiture statutes, I decline to apply such restraint to these facts. Recognizing "that traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs," Congress designed this statute to attack that trade. S. Rep. No. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3374. Jaffee grew in excess of 100 marijuana plants. Forfeiture of the entire tract of land is appropriate.

CONCLUSION

I grant the government's motion for summary judgment and deny claimant's motion.

DATED this 5 day of May, 1987.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

APPENDIX C
Order Denying Rehearing

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. TAX LOT 1500, TOWNSHIP 38 SOUTH, RANGE 2 EAST, SECTION 127, FURTHER IDENTIFIED AS 300 COVE ROAD, ASHLAND, JACKSON COUNTY, OREGON, Defendant-Appellant, KENNETH M. JAFFEE, Claimant-Appellant.	No. 87-4011 D.C. No. CV-85-6446-OMP ORDER

(Filed Apr. 14, 1989)

Before: GOODWIN, Chief Judge, FERGUSON, Senior Circuit Judge and ALARCON, Circuit Judge.

The members of the panel have voted unanimously to deny the petition for rehearing. Judges Goodwin and Alarcon have voted to reject the suggestion for rehearing en banc and Judge Ferguson so recommends.

The full court has been advised of the suggestion for rehearing en banc, and a majority of the judges of the court has voted against it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

21 U.S.C. § 881
and
Supplemental Admiralty
and Maritime Rules C and E

§ 881. Forfeitures

(a) Property subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that –

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating

machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when –

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section

in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may –

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer

or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may –

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer –

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291 (h) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this title shall be used to pay –

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 29, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A) –

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) is not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies.

(f) Forfeiture and destruction of schedule I or II substances

(1) All controlled substances in schedule I or II that are possessed, transferred sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter under such circumstances as the Attorney General may deem necessary.

(g) Plants

(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil forfeiture proceedings

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of

this chapter which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue

In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(l)[1] Agreement between Attorney General and Postal Service for performance of functions

The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

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[1] So in original.

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule C. Actions in Rem: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Judicial Authorization and Process. Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or

within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) **Ancillary Process.** In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) **Claim and Answer; Interrogatories.** The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent,

bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(As amended Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule E. Actions in Rem and Quasi in Rem: General Provisions

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; Security.

(a) Complaint. In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) Security for Costs. Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against the party by any interlocutory order

or by the final judgment, or on appeal by any appellate court.

(3) Process.

(a) Territorial Limits of Effective Service. Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) Issuance and Delivery. Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshal shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or a deputy

marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions with Respect to Property in Custody. The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) Expenses of Seizing and Keeping Property; Deposit. These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(f) Procedure for Release from Arrest or Attachment. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603

and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

(5) Release of Property.

(a) Special Bond. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) General Bond. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all

actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) Release by Consent or Stipulation; Order of Court or Clerk; Cost. Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) Possessory, Petitory, and Partition Actions. The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) Reduction or Impairment of Security. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

(7) Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed; and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

(a) Actions for Forfeitures. In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) Sales, Proceeds. All sales of property shall be made by the marshal or a deputy marshal, or other proper officer assigned by the court where the marshal is

a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

(As amended Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987.)

Supreme Court, U.S.
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No. 89-73

In the Supreme Court of the United States

OCTOBER TERM, 1989

KENNETH M. JAFFEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Whether the forfeiture of a house, a garage, and a five-acre lot used to cultivate marijuana violated the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments.

2. Whether the courts below properly declined to limit the scope of the forfeiture on nonconstitutional grounds.

3. Whether the in rem arrest of the real property comported with due process.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 861 F.2d 232. The opinion of the district court (Pet. App. A12-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988, and a petition for rehearing was denied on April 14, 1989 (Pet. App. A20-A21). The petition for a writ of certiorari was filed on

July 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed a civil complaint in the United States District Court for the District of Oregon seeking in rem forfeiture under 21 U.S.C. 881 (a)(7) (Supp. V 1987) of a parcel of real property (petitioner Tax Lot 1500) that was used to cultivate marijuana. The district court granted the government's motion for summary judgment, and the court of appeals affirmed.

1. The underlying facts are summarized in the opinions below. Pet. App. A3-A4, A13-A14. The property at issue consists of a house, a garage, and the five acres of land on which they are situated. In August 1985, state law enforcement officers executed a warrant for the search of the premises and seized 143 marijuana plants. Most of the plants were in a garden near the house, but some also were found under a skylight in an upstairs bedroom and on a deck over the garage. E.R. J17.[1] The search also uncovered packaged baggies of marijuana, weighing scales, photographs of growing marijuana, and books containing instructions on the manufacture of drugs. E.R. J18. Petitioner Jaffee, the owner of the property, subsequently pleaded guilty to state charges of manufacturing marijuana, for which he was sentenced to two years' probation. E.R. B4.[2]

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[1] "E.R." refers to the Excerpts of Record filed in the court of appeals.

[2] On June 20, 1986, Jaffee was arrested for being an ex-felon in possession of firearms. On July 9, 1985, his probation was revoked, he was sentenced to six months' imprisonment,

2. On October 16, 1985, following Jaffee's plea of guilty to the state charges, the United States filed the complaint in this in rem proceeding, seeking forfeiture of the parcel of real property pursuant to 21 U.S.C. 881(a)(7). (Supp. V 1987) E.R. A. At the same time, the government filed a motion to issue a warrant for the arrest of the property. The motion was supported by an affidavit of DEA Agent Frank Balazs, which set forth the basis for the probable cause to believe that the property had been knowingly used by Jaffee to cultivate marijuana. E.R. B. After reviewing these materials, the magistrate entered an order for a warrant of arrest, which was promptly issued by the clerk. E.R. C. An affidavit filed in support of the government's motion for summary judgment estimated that the value of the plants at maturity would exceed $500,000. E.R. J20. Jaffee estimated the value of the plants at the time of the seizure to be less than $1,000. Pet. App. A13.[3] The value of the property was approximately $95,000. Pet. App. A3.

On cross-motions for summary judgment, the district court entered a judgment of forfeiture in favor of the United States. Pet. App. A12-A19. The court rejected petitioner Jaffe's contention that forfeiture of the house, garage, and five-acre tract was so excessive as to violate the Eighth Amendment of the Constitution. Pet. App. A17-A18. The court found it significant that Jaffee was not growing the mari-

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and his probation was continued for two more years. E.R. J19-J20.

[3] The government's estimate was based on a wholesale value of approximately $2,000 per pound and a yield of between two and three pounds per mature plant. By those calculations, the plants, at maturity, would have been worth between $500,000 and $1 million. E.R. J20; see Pet. App. A3.

juana for his personal use. The court also was unpersuaded by Jaffee's estimate that the marijuana was worth only $1,000 at the time of seizure, because "[i]f the officers had discovered the plants later in the growing season, the government estimates that the value of the crop would have exceeded the value of the property." *Id.* at A18. The court also declined to limit the forfeiture to the garden plot in which marijuana was cultivated, since the applicable forfeiture statute, 21 U.S.C. 881(a)(7) (Supp. V 1987), provided for the forfeiture of "the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part" to commit a drug offense. Pet. App. A18-A19.

3. The court of appeals affirmed the judgment of forfeiture. Pet. App. A1-A11. The court first concluded that the Eighth Amendment proportionality analysis that it had applied in the context of criminal forfeitures does not apply to civil in rem forfeitures. *Id.* at A4-A7. The court "found no case holding the eighth amendment applicable to civil forfeiture actions," and it observed that "[t]he text of the eighth amendment 'suggests an intention to limit the power of those entrusted with the criminal-law function of government.'" *Id.* at A4-A5, quoting *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977). The court of appeals also relied on *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974), where this Court explained that under traditional principles of civil forfeiture, an object used in the commission of an offense is itself guilty, and forfeitable to the State, regardless of the innocence of the owner. Because civil forfeiture focuses on the involvement of the property, not punishment of the owner, the court of appeals found the proportionality

analysis suggested by its prior criminal cases to be inapplicable. Pet. App. A5-A7. The court similarly held that the district court had correctly declined to forfeit less than the entire five-acre tract, in light of Jaffee's "extensive operation" and his deliberate choice to risk forfeiture when he decided to grow marijuana on the property. *Id.* at A9.

Finally, the court of appeals rejected Jaffee's challenge to the constitutionality of the forfeiture statute's provision for seizure of property by the Attorney General. The statute permits seizure "upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims," 21 U.S.C. 881(b) (1982 & Supp. V 1987), without prior review by a judicial officer. In this case, however, the court of appeals noted that "the government sought prior approval from a magistrate before seizing the property." The court concluded that "[t]his precautionary prior judicial review sufficiently cured any possible constitutional defect." Pet. App. A10.

ARGUMENT

1. The statute at issue here, 21 U.S.C. 881(a)(7) (Supp. V 1987), provides for the forfeiture of "[a]ll real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit * * * a violation of this subchapter." The district court declared the five-acre lot and the house and garage situated on that lot to be forfeited to the United States under 21 U.S.C. 881(a) (1982 & Supp. V 1987), because they were used to cultivate marijuana. Petitioners contend (Pet. 10-17) that the forfeiture of the whole parcel was excessive under the Eighth Amendment. This argument is without merit. The court of appeals correctly held that the

Eighth Amendment does not apply to in rem civil forfeiture proceedings. But even if the Eighth Amendment is applicable, the forfeiture at issue here is not excessive or disproportionate under that Amendment.

a. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Court recently held that the Excessive Fines Clause of the Eighth Amendment does not limit the amount of punitive damages that may be awarded in a civil action between private parties. *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989). In so holding, the Court observed: "Given that the Amendment is addressed to bail, fines, and punishments, [the Court's] cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments." *Id.* at 2913. The text of the Amendment and the Court's understanding of its scope demonstrate that the Amendment is inapplicable in the present setting as well.

A forfeiture action brought under 21 U.S.C. 881 (1982 & Supp. V 1987) is not an in personam criminal prosecution of the owner of the property, and the resulting forfeiture is not a "punishment" or "fine" imposed on the defendant in such a prosecution. Rather, a forfeiture action under Section 881 is a civil in rem proceeding, in which the property itself (not the owner) is the defendant. The Court discussed the origins and bases for in rem forfeitures in *Calero-Toledo*, which arose under a forfeiture statute patterned after 21 U.S.C. 881(a) (1982 & Supp. V 1987). See 416 U.S. at 686-687 & n.25. There, the Court sustained the forfeiture of a yacht on which marijuana was discovered, even though the yacht was in the possession of a lessee at the time and the owner

was innocent of any wrongdoing. The Court explained that in rem forfeiture of objects used in violation of customs and revenue laws has deep historical roots in English practice, under which the objects themselves were treated as the offenders. That practice was continued in this country, from the adoption of the Constitution to the present day, and has been applied as well under other statutes providing for the forfeiture of property used in a variety of criminal enterprises. *Id.* at 680-685. Of particular relevance here, the Court noted that forfeiture of property that has been used—and may be used again—in violation of the narcotics laws prevents further illicit use of the property and discourages trafficking in controlled substances. *Id.* at 686-687.[4] See also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984). Thus, both history and this Court's decisions establish that " 'the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*.' " *Calero-Toledo*, 416 U.S. at 684, quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

As petitioners note (Pet. 10-11), the Court in *Browning-Ferris* did not foreclose the possibility that the Excessive Fines Clause might apply in some types of civil actions brought by the government. Thus, the Court pointed out that the suit was between private parties and that the State itself had not "used the

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[4] The courts of appeals also have recognized that civil forfeiture under 21 U.S.C. 881 serves broad remedial purposes that differ from those underlying the criminal provisions of the drug laws. See *United States* v. *Santoro*, 866 F.2d 1538, 1543-1544 (4th Cir. 1989) (citing cases); *United States* v. *D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544 (5th Cir. 1987), cert. denied, 108 S. Ct. 1270 (1988); *United States* v. *$2,500 in U.S. Currency*, 689 F.2d 10, 13 (2d Cir. 1982).

civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." 109 S. Ct. at 2920. Contrary to petitioners' suggestion (Pet. 10-11), however, there is no occasion here to consider whether the Eighth Amendment has any application beyond criminal prosecutions. For the reasons given above, the origins, rationale, and purposes of in rem forfeiture demonstrate that it is considerably removed from the Eighth Amendment's purpose of preventing personal oppression of individuals. Moreover, the clause of the Eighth Amendment that speaks most directly to the imposition of personal punishment through deprivations of property prohibits only excessive "fines"; it does not mention excessive "forfeitures." The significance of this omission is underscored by the fact that the Constitution elsewhere regulates the imposition of forfeitures, but only in one particular way: Article III, Section 3, prohibits the forfeiture of estates resulting from a conviction for treason—a personal punishment imposed on the convicted defendant. The fact that the Eighth Amendment refers only to "fines," which both impose personal punishment and give rise to personal liability on the part of a defendant, indicates that in rem forfeiture of property is outside the scope of the Clause.

Petitioners contend (Pet. 11-12) that the Eighth Amendment is applicable because civil forfeiture actions have sometimes been described as "quasi-criminal" in nature, even though they are not criminal prosecutions. However, in rem forfeiture actions have been regarded as "criminal 'only for the purposes of the fourth amendment search and seizure clause [*One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965)] and the fifth amendment self-incrimination clause' [*Boyd* v. *United States*, 116 U.S.

616 (1886)]. * * * 'The Court has otherwise found that forfeiture statutes are civil for purposes of the double jeopardy clause and the broader range of constitutional protections applied to criminal trials'." *United States* v. *Riverbend Farms, Inc.*, 847 F.2d 552, 558 (9th Cir. 1988). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *United States* v. *Ward*, 448 U.S. 242, 251-252 (1980); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 398-400 (1938); *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931).

The holding below that the Eighth Amendment does not apply in in rem forfeiture proceedings is consistent with the identical holding by the Fourth Circuit in *United States* v. *Santoro*, 866 F.2d 1538, 1544 (1989). Petitioners have cited no contrary appellate precedent, and we are aware of none.[5] Petitioners cite (Pet. 12) only decisions holding that the Eighth Amendment is applicable to *criminal* forfeitures under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963 (1982 & Supp. V 1987), and the federal drug laws, 21 U.S.C. 853 (Supp. V 1987). *United States* v. *Busher*, 817 F.2d 1409, 1415 (1987), aff'd after remand, 872 F.2d 431 (9th Cir. 1989) (Table); *United States* v.

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[5] In *United States* v. *A Parcel of Land With a Building Located Thereon at 40 Moon Hill Road*, No. 89-1191 (1st Cir. Sept. 1, 1989), a civil forfeiture action, the court concluded that the forfeiture of a parcel of real property under 21 U.S.C. 881(a)(7) (Supp. V 1987) was not disproportionate for purposes of the Eighth Amendment, without separately addressing the applicability of the Amendment. See slip op. 7-9.

Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987). Those decisions have no application here.[6]

b. Even if the Eighth Amendment is applicable in this setting, the forfeiture of the property at issue here plainly was not "grossly" or "significantly" disproportionate to Jaffee's offense for purposes of that Amendment. See *Solem* v. *Helm*, 463 U.S. 277, 288, 303 (1983); *United States* v. *Busher*, 817 F.2d at 1415. Petitioners' argument to the contrary rests entirely on Jaffee's estimate that, at the time of seizure, the plants were worth less than $1000, while the lot and appurtenances were worth approximately $95,000. But as the district court observed in holding that the forfeiture was not excessive under the Eighth Amendment, "[t]his was not a small amount of contraband for personal use" even at the time of seizure, and if the officers had discovered the plants later in the growing season, their value would have far exceeded the value of the forfeited property. Pet. App. A18. The statute provides for the forfeiture of all real property, including any lot or tract of land, "which is used, *or intended to be used*," to commit a violation of the relevant sections of the drug laws. 21 U.S.C. 881(a)(7) (Supp. V 1987) (emphasis added). Petitioners do not dispute that the property was "intended to be used" to grow the

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[6] Any divergence between the decision below and the decisions in *Busher* and *Littlefield* presents only an intracircuit conflict, which does not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). As petitioners concede (Pet. 13), in *United States* v. *Monroe*, 866 F.2d 1357 (1989), the Eleventh Circuit left open the question whether the Ninth Circuit had correctly applied the Eighth Amendment even in a criminal forfeiture case. 866 F.2d at 1367.

marijuana to maturity, and the value of the marijuana at that time therefore is clearly relevant.[7]

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[7] Petitioners contend (Pet. 16-17) that the district court erred in granting summary judgment because there was a dispute concerning the value of the contraband and because, in their view, the DEA agent's affidavit contained inadmissible hearsay on the issue of valuation. These objections are without merit. The government did not challenge Jaffee's estimate that the value of the immature plans was $1000, and petitioners did not dispute that the value of the plants at maturity would have been many times that amount. There thus was no disputed issue of material fact, but only an issue of law concerning the relevance of the latter value—an issue that was properly resolved on a motion for summary judgment.

Petitioners' hearsay objection to the DEA agent's valuation of the marijuana at maturity is without merit because the agent relied on official data gathered by governmental entities, which are admissible under Fed. R. Evid. 803(8). In any event, it is well established that the government may rest on reliable hearsay evidence in establishing probable cause to believe that property is subject to forfeiture; in an in rem proceeding, that showing shifts to the claimant the burden of showing that the property is not subject to forfeiture. See *United States* v. *Premises Known as 526 Liscum Drive*, 866 F.2d 213, 217 n.3 (6th Cir. 1989); *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 897-900 (1st Cir. 1987); *United States* v. *A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986); *United States* v. *One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276, 1281-1283 (9th Cir. 1983). There is no reason why a different rule should be applied here—especially since petitioners do not dispute the government's showing that the property was used in connection with illegal drug activities and the constitutional defense requires the owner to bear the burden of showing that the forfeiture was grossly disproportionate. Petitioners do not deny that, if the value of the marijuana at maturity is a relevant consideration, the marijuana would have been ~~sujeiently~~ sufficiently valuable at maturity to eliminate any contention that the forfeiture was grossly disproportionate.

In this case, moreover, there can be no contention that the owner of the property was innocent of any wrongdoing: Jaffee pleaded guilty under state law to the manufacture of marijuana, and he does not dispute in this Court that the marijuana was grown under his control. Nor is this an instance in which forfeiture is premised on the presence of a very small quantity of marijuana that may have been intended only for personal use (compare *In re Forfeiture of 719 North Main*, 175 Mich. App. 107, 117, 437 N.W.2d 332, 337 (Mich. 1989), quoted at Pet. 18 n.1) or in which the forfeited property had only an incidental relation to a single drug transaction (see *United States* v. *Premises Known as 3639-2nd Street, N.E.*, 869 F.2d 1093, 1095-1096 (8th Cir. 1989), distinguishing *United States* v. *Certain Lots in Virginia Beach*, 657 F. Supp. 1062 (E.D. Va. 1987)). In a similar case, the First Circuit recently rejected an Eighth Amendment challenge to the forfeiture of real property where the marijuana plants involved—which were fewer in number but more mature than those seized here—reflected a "large-scale, high-volume marijuana production operation." *United States* v. *A Parcel of Land With a Building Located Thereon at 40 Moon Hill Road*, slip op. 7-9.

In the end, proportionality and excessiveness under the Eighth Amendment depend on "evolving standards of decency that mark the progress of a maturing society." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). Modern standards are largely determined by legislative and congressional judgments. See, *e.g.*, *Solem* v. *Helm*, 463 U.S. at 299. It is beyond question that current laws manifest a firm commitment at all levels of government to the eradication of drugs from society, and

the use of the forfeiture mechanism is an essential part of that effort. See *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2654-2655 (1989). It therefore is not surprising that petitioners' argument fails under the precedents on which they rely for still another reason: they have made no showing that the forfeiture here is out of line with other forfeitures authorized by federal or state law. Compare *Solem* v. *Helm*, 463 U.S. at 292, 298-300; *United States* v. *Busher*, 817 F.2d at 1415-1416.

2. Petitioners also contend (Pet. 17-19) that the court of appeals erred in concluding that principles of judicial restraint in applying the forfeiture sanction to a tract of real property are inapplicable in civil forfeiture cases. Petitioners mischaracterize the holding below. The court of appeals did not find the principles upon which petitioners rely inapplicable here; it instead held, as did the district court, that forfeiture of the lot and appurtenances is appropriate under those principles. See Pet. App. A7-A9, A18-A19. That fact-bound holding by both courts below does not warrant review.

In the two cases upon which petitioners principally rely, the applicable statute provided for forfeiture of the "lot or tract" on which a distillery was situated. The courts in those cases declined to forfeit an entire farm (totalling 130 or 150 acres) simply because an illegal distillery was situated on one portion of the farm. The courts reasoned that the statutory term "lot" presumably referred to a plot of a standard size in a village, and that the term "tract" should be read in a comparably circumscribed manner that did not embrace those portions of a large farm that had no connection to the distillery. *United States* v. *Certain Piece of Land*, 25 F. Cas. 366 (D. Cal. 1870) (No.

14,767); *United States* v. *About 151.682 Acres of Land*, 99 F.2d 716 (7th Cir. 1938).

The circumstances of this case are far different. The evidence showed that the house and garage were used in growing marijuana, and there accordingly is no question regarding the propriety of the forfeiture to that extent. The courts below likewise did not abuse their discretion in treating the five-acre parcel at issue here as a single "lot" or "tract" for purposes of 21 U.S.C. 881(a)(7) (Supp. V 1987). The area in question is zoned for farm use only, with a five-acre minimum for any one parcel, and a well that was situated a good distance from the house was the only source of water for the property, including the marijuana. E.R. J19; E.R. K11-K12. Indeed, the subject property is identified in the caption in this case as "Tax *Lot* 1500" (emphasis added), thereby indicating that the entire five acres, rather than some fraction thereof, is regarded as the appropriate unit of land generally, and therefore is properly regarded as the unit to be forfeited under a statute applying to any "lot or tract" that is used in whole or in part for drug-related purposes.

This approach is consistent with that taken in other cases. In *United States* v. *Certain Piece of Land*, although the court declined to declare the entire farm forfeited, it did order forfeiture of a separately platted, several-acre tract within the farm on which the distillery was situated. 25 F. Cas. at 367. Accord, *Norbriga* v. *United States*, 55 F.2d 146, 149 (1st Cir. 1932). The other cases upon which petitioners rely highlight this distinction between a small, well-defined lot or tract, on which the prohibited operations occurred, and a much larger farm. See *United States* v. *About 151.682 Acres of Land*,

99 F.2d at 718, 719-720; *United States* v. *Twenty Acres of Land*, 213 F. Supp. 808, 811-812 (E.D. Tenn. 1962).

3. Finally, petitioners contend (Pet. 20-24) that the seizure of the premises did not comply with due process. They first argue (Pet. 21-22) that Jaffee was entitled to an opportunity for a pre-seizure adversarial hearing. This Court has made it clear, however, that "'[D]ue process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture'." *United States* v. *Von Neumann*, 474 U.S. 242, 249 n.7 (1986); see also *United States* v. *$8850*, 461 U.S. 555, 562 n.12 (1983).[8] Petitioners maintain (Pet. 21-22) that this case is distinguishable from *Von Neumann* and *$8850* because it involves real property, not personal property that could have been transferred out of the jurisdiction in the absence of the seizure. But it also is distinguishable from those cases on the ground that Jaffee was not ousted from his possession of the property pending the completion of forfeiture proceedings. He therefore was not subjected to any substantial deprivation of property during that interim period.

In *Calero-Toledo*, the Court rejected the claim that a pre-seizure hearing was required. The Court noted that the seizure served significant governmental interests by allowing the assertion of in rem jurisdiction over the property, that pre-seizure notice might frustrate the forfeiture scheme by enabling the person in possession to remove or destroy the property,

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[8] See also *United States* v. *One 1980 Red Ferrari*, 875 F.2d 186, 189 (8th Cir. 1989); *United States* v. *One 1985 Cadillac Seville*, 866 F.2d 1142, 1147 (9th Cir. 1989); *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 450 n.5 (9th Cir. 1983), cert. denied, 464 U.S. 1071 (1984).

and that the seizure was initiated by disinterested government officials. 416 U.S. at 679-680. Thus, the moveability of the property was only one of the factors upon which the Court relied. Here, the arrest of the property was equally essential to obtain in rem jurisdiction over it, and the seizure was initiated by disinterested government officials. In addition, although the house, garage, and land were not moveable, there was a substantial governmental interest justifying the limited seizure, in order to prevent any continuing use of the property for drug-related purposes and any destruction of evidence or waste of the property. Moreover, here, unlike in *Von Neumann*, *$8850*, and *Calero-Toledo*, a warrant for arrest of the property was approved by a magistrate prior to the seizure, and Jaffee could not seriously contest the existence of probable cause, since he had pleaded guilty to the state-law charges.

In any event, as Jaffee concedes (Pet. 21), there is no circuit conflict on this issue that warrants review. In *United States* v. *A Single Family Residence*, 803 F.2d at 631-632, the court held that a seizure of real property may be accomplished pursuant to a warrant issued by the clerk of court, without prior approval by a judicial officer. Accord *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558 (11th Cir. 1988). In *United States* v. *South Half of Lot 7 & Lot 8, Block 14*, 876 F.2d 1362, 1368-1372 (8th Cir. 1989), the court held that approved by a judicial officer is required for such a warrant to issue.[9] In neither case, however, did the court hold that a pre-seizure *adversarial* hearing was required.

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[9] The Eighth Circuit has granted the government's petition for rehearing en banc in the latter case. See 883 F.2d 53 (1989).

Petitioners also argue (Pet. 23-24) that due process required a prompt *post*-seizure opportunity for a hearing. That opportunity, however, was afforded in these in rem forfeiture proceedings, which were instituted simultaneously with the arrest of the property. The timeliness of the opportunity for a hearing in such a proceeding is governed by the standards enunciated in *United States* v. *$8850*, 461 U.S. at 564-570. Petitioners do not contend that those standards were violated here. This due process claim therefore does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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